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Supreme Court, U.S.
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No. 98-987

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

KENNETH HELLER,

Petitioner,

vs.

JEANNETTE YANNITELLI, individually, and ALBERT J. YANNITELLI, as Administrator of the Estate of Donato Yannitelli,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, FIRST DEPARTMENT

RESPONDENTS' BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Should certiorari be denied where the issues Petitioner seeks to raise were not ruled upon nor even raised in the highest state court which passed on this case?

2. Does federal due process require an evidentiary hearing before a court may declare that an attorney has forfeited entitlement to additional legal fees where the undisputed documentary and the uncontested testimonial evidence conclusively establish the attorney's multiple violations of the New York Code of Professional Responsibility?

3. Does federal due process permit a state court to summarily determine the issue that an attorney has forfeited entitlement to additional legal fees due to his admitted unethical misconduct, where the attorney had notice of the issue presented and the facts on which it was based, as well as the opportunity but chose not to contest that issue or the relevant material facts?

4. Does summary civil forfeiture of entitlement to additional legal fees by an attorney who indisputably commits multiple violations of a state's Code of Professional Responsibility violate the Eighth Amendment?

5. Does federal due process require a judge to recuse herself because a party makes it known that he will support another person for her judicial office in the next election where New York State law does not require such recusal?

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STATEMENT OF THE CASE[1]

This simple fee dispute between attorney and clients was resolved under well-settled state law, predicated upon uncontested findings of documented facts. The decision below declared that the Petitioner lost his entitlement to any additional fee, based upon undisputed facts consisting of the Petitioner's own writings and his sworn court submissions (R. 1056, 703, 705, 707, 1525; 549, 553; 787, 786) and undisputed actions and inactions conclusively establishing Petitioner's unethical misconduct. Thus, there is and can be no dispute as to what Petitioner said, or improperly did or did not do.

Petitioner failed to raise and preserve any U.S. Constitutional or other federal law issue in the trial court (the Individual Assignment System Motion Part of the New York Supreme Court), which held that Petitioner forfeited any right to any additional fee, or on his appeal to the Appellate Division which unanimously affirmed (P. App., B and C, A). Petitioner does not and did not even claim that the decision below conflicts with any apposite federal cases.

Petitioner raised for the first time the issues of *state* constitutional due process, only, and of a "harm v. penalty" analysis, on his motion in the New York Court of Appeals seeking a discretionary appeal. The New York Court of Appeals denied both Petitioner's motion for leave to appeal, and his motion to renew and/or reargue such denial, without any reference to the newly raised issues (P. App., D, E). Thus, the state courts never passed on any of the myriad issues which Petitioner belatedly seeks to raise in this Court.[2]

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1. Items designated ("R.") refer to the Record on Appeal; items designated ("P. App.") refer to Petitioner's Appendix; items designated ("R. App.") refer to Respondents' Appendix.

2. In New York, a party may not raise for the first time on appeal constitutional or other issues not presented to the trial court. *Lichtman*

(Cont'd)

Consequently, there are no genuine federal questions involved here or properly developed below and preserved for appellate review, nor is there any conflict between the result below and any applicable federal cases. We respectfully submit that this Court does not have jurisdiction over the issues now sought to be raised by Petitioner. In any event, this Court should not exercise its discretion to grant certiorari to review these newly asserted claims.

A. The Facts

This matter arises out of a statutory special proceeding under New York's Estates, Powers & Trusts Law (the "EPTL") § 5-4.6, pursuant to which a court exercises its discretion to fix an attorney's fee. It involves nothing more than a denial of an attorney's claim for additional counsel fees due to the attorney's admitted multiple violations of the New York Code of Professional Responsibility. Contrary to Petitioner's assertions, this is not a plenary action in which the state court imposed sanctions or a penalty or a fine.

The primary issue in this proceeding, stemming from final settlement of an underlying 17-year-old wrongful death action (R. 103, 105), was whether Respondents Jeannette Yannitelli (and her four non-party statutory distributee-beneficiary sons, R. 623-625, 679, 681; 1597; 1666-1670)[3] were entitled to an

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v. Grossbard, 73 N.Y. 2d 792, 794 (1988), *reh. den.*, 73 N.Y. 2d 912 (1989); *Melahn v Hearn*, 60 N.Y. 2d 944, 945 (1983); and, a movant is not entitled to raise new issues in reply papers. *Azzopardi v. American Blower*, 192 A.D. 2d 453 (1st Dep't 1993); *O'Sullivan v. O'Sullivan*, 206 A.D. 2d 957 (4th Dep't 1994). The rule is the same in federal court. *E.g.*, *Francis S. v. Stone*, 995 F. Supp. 368 (S.D.N.Y. 1998).

3. Petitioner refers to Ms. Doneve Booth, the decedent's daughter from a prior marriage, as a possible additional distributee-beneficiary. (Cont'd)

attorney who complied with and did not violate the Disciplinary Rules and the Ethical Considerations of the New York Code of Professional Responsibility (Judiciary Law, 29 McKinney's Cons. L. of New York), New York's EPTL and the contingency fee contract rules of the Supreme Court of the State of New York, Appellate Division, First Department (*see* 22 NYCRR § 603.7, New York Rules of Court).[4]

It is undisputed that Petitioner first obtained employment as Respondent Jeannette Yannitelli's attorney when he introduced himself to and solicited Mrs. Yannitelli at her husband's wake (R. 579), a clear violation of DR 2-103. During the long years of his representation of Mrs. Yannitelli, Petitioner entered into one or more business relationships with Mrs. Yannitelli, either as her real estate partner (R. 587-588), allegedly having a joint interest with Mrs. Yannitelli in a sailing vessel, *see Yannitelli and Heller v. Navieras de Puerto Rico*, 103 F.R.D. 413 (S.D.N.Y. 1984), or as her alleged creditor (R.

(Cont'd)
The issue of her interest, if any, has nothing to do with the instant fee dispute and is not before this Court because no state court has yet ruled upon that issue which is to be resolved in a proceeding to be commenced in the Surrogate Court of the State of New York, Putnam County. Petitioner never raised this issue in the state courts until his motion in the New York Court of Appeals for leave to appeal; and, while he then claimed — for the first time — to have represented Ms. Doneve Booth's as yet undetermined interests, if any, Petitioner made no effort at any time in any of the proceedings below "to protect" whatever interest Ms. Booth allegedly may have.

4. Named co-plaintiff Albert Yannitelli, as Temporary Administrator of the Estate of Donato Yannitelli, was removed as a party some time prior to 1992 (R. 633, lines 14-21; 575-576). Defendants Mid-Hudson Aircraft Repairs, Inc. and John P. Dennis settled out in 1992 (R. 630-631; 679); the remaining defendant D. Yannitelli & Sons Construction Corp. settled in 1995 (R. 777, 555-557).

873-881) or her debtor (R. 1173) — or all four — resulting in a clear and undisputed violation of DR 5-104(a). *Matter of Mayerhoff*, 213 A.D. 2d 37 (2d Dep't 1995) and DR 5-101(a). While her attorney, Petitioner called Mrs. Yannitelli a thief and he also defamed her sons (R. 1370, 1374, 1788; 1402), a violation of DR 4-101(B) and EC 5-1 (an attorney should not speak ill of a client).[5]

In 1992, defendants Mid-Hudson and John P. Dennis offered to settle for $1,000,000, the maximum coverage of their insurance (R. 679). After Petitioner failed to obtain a jury verdict in the underlying wrongful death action (R. 582; 695), such settlement with Mid-Hudson and Dennis was effectuated (R. 630-631; 679). The trial court thereafter awarded to Petitioner $175,772.00 for unproved disbursements, and 1/3 of the balance, *to wit*: $274,742.00, pursuant to his contingency fee agreement (R. 580, 107), for *all* of his services and expenses to that date (679-681). Thus, Petitioner received $450,514.67, almost 50% of the 1992 settlement.

It is undisputed that the remaining portion of the 1992 settlement, which was immediately to have been paid to Mrs. Yannitelli and her sons (R. 681), instead was removed from New York by Petitioner and deposited in a bank in Cresskill, New Jersey (R. 584), in violation of DR 9-102(b) (client funds must be deposited in a bank in New York State); *see also Leon v. Martinez*, 84 N.Y. 2d 83, 90 (1994) (an attorney must promptly notify client of receipt of and pay over to client monies

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5. During the appellate process and while Mrs. Yannitelli's attorney of record below, Petitioner also unsuccessfully sued her for defamation and tortious interference with contract. That action was dismissed pursuant to a judgment dated and entered September 25, 1998 in the New York County Clerk's Office, in an action entitled *Kenneth Heller, individually, and Kenneth Heller, P.C. v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 107281/97 (Hon. Stuart Cohen).

belonging to client). Petitioner then sued Mrs. Yannitelli on disputed promissory notes (R. 873-881), a clear conflict of interest. *See Matter of Benjamin*, 129 A.D. 2d 886, 887-889 (3rd Dep't), *appeal dismissed*, 70 N.Y. 2d 660 (1987).[6]

In 1995, after a three-year hiatus during which almost nothing happened in the underlying wrongful death action (R. 823-824, 825 ¶ 7), Petitioner negotiated a settlement with the remaining defendant after only a few social dinners with its insurer's adjuster (R. 777). But, Petitioner did not move to have a court fix his fee nor did he pay over even a portion of the new 1995 settlement proceeds.

In violation of the negotiated FULL RELEASE settlement agreement between the Yannitellis and the remaining defendant, to which agreement Petitioner was a party (R. 1234), he took sole possession of the 1995 settlement proceeds; and, he did so purportedly in his individual capacity as attorney for decedent's Estate (R. 554), a position he did not have (R. 614, 615) and legally could not have.[7] Although such settlement proceeds

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6. That 1992 lawsuit on the notes was discontinued (R. 585, 698 ¶ 1). But, in 1996, Petitioner caused the incorporation of Rio Palm Realty Corp. and, during the last two years, while still Mrs. Yannitelli's attorney of record here, he unsuccessfully sought to have his alter ego, Rio Palm, sue Mrs. Yannitelli on those same notes in Florida and again in New York. *See* Order of Dismissal, entered September 25, 1997 in the Office of the Circuit Court of the Twentieth Judicial Circuit In and For Lee County, Florida, in *Rio Palm Realty Corp. v. Jeannette Yannitelli*, Case No. 96-2722 CA LG; and, the motion file and judgment of dismissal entered December 1, 1998 in the New York County Clerk's Office, in *Rio Palm Realty Corp. v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 601522/98, I.A.S. Part 13 (Hon. Sheila Abdus-Salaam, J.).

7. *E.g.*, *Matter of Schrauth*, 249 App. Div. 847 (2d Dep't 1937); *Matter of Scanlon*, 2 Misc. 2d 65, 69 (Sup. Bx. Co., 1956) (an attorney represents fiduciaries, not the Estate).

were, by statute, for "the exclusive benefit of the decedent's distributees," EPTL § 5-4.4, except to the extent that a court subsequently fixes and authorizes counsel fees to be paid out of such proceeds, Petitioner did not seek judicial relief under EPTL §§ 5-4.4 and 5-4.6 or 22 NYCRR § 603.7. Instead, he wrongfully transferred the proceeds to Dean Witter Reynolds, Inc., a non-bank entity which does not maintain escrow accounts (R. 1239 ¶ 3), a clear violation of DR 9-102(b)(1) (client's funds must be deposited in escrow, in a bank) depositing such proceeds into a so-called "Kenneth Heller, *P.C.*, Special Account" (R. 1327-1328; 1333) (emphasis added).

Having hidden the proceeds, Petitioner advised the Yannitelli family, in writing, that no one would be paid anything from the "funds which are under *my control*" (R. 1056; emphasis added; R. App. A) until his claim on the putative notes of Mrs. Yannitelli was first satisfied. After Mrs. Yannitelli and her sons retained new counsel to locate and recover the 1995 settlement proceeds, Petitioner threatened in writing to return the settlement proceeds to the insurance company, both to protect himself from disciplinary proceedings which had just been commenced against him (R. 593-594 n.5), as well as to make *defendant*'s insurer's adjuster "more comfortable" (R. 703, 705, 707, R. App. B; and 1525, R. App. C), thereby preferring his own interests and the interests of the adversary's adjuster above the interests of his own clients, in violation of DR 5-104(a), DR 7-101(a)(1) and (3)

None of the foregoing is disputed by Petitioner; to the contrary, all of it is established by the incontestable documentary evidence.

In addition, when Petitioner belatedly moved to fix his fee which was payable, if at all, out of the 1995 settlement proceeds, he sought to hold back $250,000 on his claim of approximately

$126,000 on the putative "notes" (R. 549, 553), to the financial detriment of Mrs. Yannitelli *and* her sons (R. 576-577; 826 ¶ 10). Worse yet, in response to the Yannitelli's cross-motion seeking recovery of the 1995 settlement proceeds, the Petitioner made a claim to all — *and even more than all* — of such proceeds (R. 787, 786, R. App. D)[8].

From the beginning of this civil fee dispute, the Yannitellis consistently urged that due to Petitioner's repeated unethical behavior, he had to pay over the entire 1995 settlement proceeds and was not entitled to any fee (R. 562; 570-571; 593-595; 596-597; 600; 755-759 at 758).

After multiple motions by Petitioner (seeking the same or virtually identical relief) (P. App., C, pp. 22a-28a), the trial court held that he had forfeited his entitlement to any additional fees beyond what he received in 1992 for all services then to date, due to his undenied documented multiple violations of the New York Code of Professional Responsibility, state statute and court rules (P. App. B, pp. 15a-19a; P. App. C, p. 29a).

Petitioner had notice of all proceedings in the trial court and the opportunity to offer evidence, and repeatedly appeared before the trial court and the Appellate Division. Despite numerous opportunities, Petitioner did not raise any U.S. Constitutional or other federal issues in either of those courts. Further, he never asserted in any court that passed upon the case the claims now urged.

The only alleged facts belatedly questioned by Petitioner (P. App., F, G, pp. 34a-38a, 39a-41a) either are irrelevant to

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8. A court has the discretion to award up to or less than the agreed-upon contingency percentage of the recovery, but the attorney is never entitled to more (*e.g.*, R. 638, lines 7-11, 13-14; R. 640-641); and, excessive fees violate DR 2-106(A), (B).

whether Petitioner repeatedly violated the New York Code of Professional Responsibility and/or are not in dispute (R. 1505-1513; *see* R. App. E). Petitioner's assertions about Mrs. Yannitelli's alleged behavior in Florida and New York in unrelated matters, and Petitioner's attempts to malign Mrs. Yannitelli and her sons, have nothing to do with Petitioner's documented undenied unethical behavior, his violations of state statute and contingency fee contract court rules, or the civil forfeiture of Petitioner's entitlement to any additional fees — let alone any of the newly raised federal due process claims.

Petitioner's argument that the refusal of the trial court justice to recuse herself violated his constitutional rights under due process, without specifying whether it is state or federal due process upon which he relies, was not raised as a constitutional issue in the trial court or in the Appellate Division, and was not passed upon by any state court. In the trial court and in the Appellate Division, Petitioner relied solely upon state common law regarding discretionary recusal as well as statutory compulsory recusal under New York Judiciary Law § 14, not federal — or even state — due process.

The fact that Petitioner may have sought to find some other candidate to support in a judicial election did not give to the trial court justice any stake or personal interest in the outcome of the fee dispute.

Furthermore, the recusal issue was a self-created situation. Within one week of the trial court's Interim Order (R. 1592-1598; P. App., B, p. 10a) which was adverse to Petitioner,[9] the

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9. The Interim Order held that Petitioner could not offset his contested claim on the disputed notes against the 1995 settlement proceeds and directed Petitioner immediately to pay over two-thirds of the net amount of the principal of the 1995 settlement proceeds. Petitioner (Cont'd)

trial court convened a hearing to advise the parties that several discreetly placed telephone calls by Petitioner's some-time counsel, and others, to the trial court justice's election district manager (R. 357-358), had suddenly disclosed that Petitioner allegedly was supporting another candidate for the justice's position. The timing of those phone calls suggests that Petitioner may have attempted to create an apparent recusal situation.

REASONS FOR DENYING THE WRIT

I.

PETITIONER'S ISSUES WERE NOT PRESERVED FOR APPELLATE REVIEW.

28 U.S.C. § 1257 gives discretionary authority to this Court to review final judgments by the highest state court in which a decision could be had where any right is claimed under the Constitution of the United States. Here, that court was the New York Appellate Division, First Department (P. App., A, pp. 1a-2a), since the New York Court of Appeals denied Petitioner's request for a discretionary appeal with no opinion on any constitutional or other substantive issue (P. App., D, E, pp. 32a, 33a). *See Mellon v. O'Neil*, 275 U.S. 212 (1927) (where the Appellate Division and the Court of Appeals denied leave to appeal, the Appellate Division's substantive decision was that of the highest state court in which a decision could be had).

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refused to do until *after* his trial court and Appellate Division applications for a stay (R. 422-423, 425) were denied and on Friday, March 8, 1996, he was adjudged in contempt of court (R. 459, lines 24-25 - R. 460, lines 1-3). He purged that contempt on March 11, 1996, by tendering checks to Mrs. Yannitelli and her sons (albeit the checks were post-dated, R. 1666-1670).

While Petitioner here cites "due process" under the Fifth and Fourteenth Amendments to the U.S. Constitution, a "harm v. penalty" analysis under the Sixth and Eighth Amendments, and a due process recusal argument, he did not do so in the trial court or in the Appellate Division and neither of those state courts ruled upon such claims. Further, here Petitioner does not clearly draw a distinction between due process under the New York and the U.S. Constitutions; and, he makes no claim — let alone establishes — that the decision below conflicts with any applicable federal case concerning any of the issues belatedly sought to be raised here.

In *Adams v. Robertson*, 520 U.S. 83 (1997), this Court granted a writ of certiorari on grounds of deprivation of federal due process. Upon review, however, this Court held that it was clear that the petitioner had failed to raise the federal due process issue in the Alabama Supreme Court *and* show that the highest state court which rendered a substantive decision had passed upon that federal issue. In fact, the Alabama Supreme Court had ruled upon state law issues only. This Court held that certiorari had been improvidently granted and dismissed the writ, adhering to its traditional policy that it will not consider a petitioner's federal claim unless properly presented to and addressed by the state court that rendered the decision to be reviewed. *Id.* at 87. *See also Yee v. City of Escondido*, 503 U.S. 519, 533 (1992) (refusing to consider substantive due process claim because not raised below and because the state courts did not address that issue); *Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Illinois v. Gates*, 462 U.S. 213, 217-219 (1983).

In *Webb v. Webb*, 451 U.S. 493 (1981), this Court held that its jurisdiction to review the results of the highest state court to pass upon the issues arises "only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately presented in the state system."

Id. at 496-497. This Court noted that using a generic phrase — there, "full faith and credit" — was not sufficient to establish in this Court that a federal issue had been raised below; and, this was particularly so where, as here, the highest state court to rule on the case neither mentioned nor expressly passed upon the federal issue. *Id.* at 495.

Under these cases, Petitioner had the burden to show that his newly-asserted claims of deprivation of federal due process had been presented to, urged in and passed upon by the Appellate Division — *and* to show where, in the Record, such federal issues had been raised. Petitioner did not do so because he could not do so, inasmuch as no federal issues were presented to the trial court or in the Appellate Division.

Petitioner's claim that the result below, forfeiting his entitlement to an additional fee due to his undisputed multiple violations of the Code of Professional Responsibility, was excessive and in violation of the Eighth Amendment, also does not confer jurisdiction in this Court because, among other reasons, that claim was not raised in and passed upon by the state courts. *Bankers Life and Casualty Company v. Crenshaw*, 486 U.S. 71 (1988).

Nor should this Court seek to find an exception to the jurisdictional statute and long standing rule that federal issues must be properly raised, prosecuted *and* passed upon in state court to confer jurisdiction, when the only result of granting certiorari would be to provide another opportunity for Petitioner to meritlessly harass and abuse his clients, who have already been forced to incur fees in excess of $373,866.91 just to obtain the money which rightfully belonged to them.[10]

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10. In addition to Petitioner's repetitive motions in the trial court (P. App., C, pp. 23a-28a), and his wrongful refusal to comply with the

(Cont'd)

(Cont'd)
Interim Order until after being held in contempt of court, n.9, *supra*, in February, 1996 Petitioner sued for a declaratory judgment seeking essentially the same relief as he then sought on all of his pending trial court motions in this fee dispute special proceeding; that declaratory judgment action, entitled *Kenneth Heller v. Jeannette Yannitelli, Vincent Yannitelli, Tino Yannitelli, Anthony Yannitelli and Donato Yannitelli*, N.Y. Co. Clerk's Index No. 103745/96, was dismissed by judgment entered in the New York County Clerk's Office on August 21, 1996. Further, pending his appeal from the subject trial court Order, Petitioner — who lost in the trial court — nevertheless sought the release *to him* of the settlement proceeds then held by Dean Witter by way of two unsuccessful motions in the Appellate Division and one in the Court of Appeals, and he thereafter repeatedly sought to stay his own appeal. He also sued Mrs. Yannitelli to recover the fee, the entitlement to which here had just been declared forfeited, in a plenary action for breach of contract, unjust enrichment and in quantum merit, in *Kenneth Heller, individually, and Kenneth Heller, P.C. v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 606031/96, which was dismissed pursuant to judgment entered in the New York County Clerk's Office on June 30, 1997. He also sued Mrs. Yannitelli for alleged defamation; and, he twice sought to have his alter ego, Rio Palm Realty Corp., sue Mrs. Yannitelli on the putative "notes", *see* nn. 5 and 6, *supra*; and, on August 11, 1998, Petitioner filed yet another lawsuit against Mrs. Yannitelli on these same putative "notes" (albeit phrased as alleged breach of an inappropriate 1992 escrow), in *Kenneth Heller, individually, (and Kenneth Heller, P.C.) v. Jeannette Yannitelli*, N.Y. Co. Clerk's Index No. 98/603943.

Lastly, after the balance of the 1995 settlement proceeds were finally paid over by Dean Witter in July, 1998, Petitioner unsuccessfully moved for a return of such proceeds. Because of the history of Petitioner's repetitive litigation tactics, by Order dated December 11, 1998, entered in the New York County Clerk's Office on December 15, 1998, the trial court in this case not only denied Petitioner's spurious motion, but also enjoined Petitioner from bringing any further actions, proceedings or motions against the Yannitellis (and certain other designated persons) in any state or federal court without prior leave of the trial court.

II.

THE SUMMARY DECISION AGAINST PETITIONER RAISES NO DUE PROCESS ISSUES.

The requirements of due process were fully safeguarded in the proceedings below. Petitioner had notice of all proceedings below, as evidenced both by his repetitive motions and responses to the various Yannitelli cross-motions in the trial court, and on his appeal and his repeated motions to stay that appeal, to supplement the Record on Appeal and to submit a supplemental appellate brief. In the trial court, Petitioner had numerous opportunities to introduce evidence and did so, but utterly refused to contest Respondents' substantial documentary evidence of Petitioner's unethical conduct and his violations of law and court rules, thereby rendering such evidence admitted. Indeed, almost all of the evidence of Petitioner's unethical behavior was proved in the trial court by Petitioner's own undisputed letters and his written sworn court submissions — as well as his undenied improper acts and inactions. Petitioner appealed without denying that he acted unethically, asserting only (but for the first time on appeal) that his *admitted* repeated violations of the Code of Professional Responsibility were not as reprehensible as violations by other attorneys in other cases.

Under such circumstances, where Petitioner was fully involved at all stages below, and the facts of his unethical behavior were documented by Petitioner's own writings and thus undisputed, the requirements of due process have been met and no evidentiary hearing was required. *Kicking Woman v. Hodel*, 878 F.2d 1203, 1208 (9th Cir. 1989).

It is axiomatic that an attorney who violates the Code of Professional Responsibility forfeits entitlement to a fee.

Petitioner is a seasoned attorney and knew (or should have known) of, and in any event, was bound by that rule.

Pursuant to New York Civil Practice Law and Rules § 3212, summary judgment is to be granted when there is no genuine question of material fact. Indeed, New York courts frequently declare on motion (without an evidentiary hearing) that an attorney's fee is forfeited due to unethical behavior where, as here, there is no factual dispute as to what the attorney has done. *E.g.*, *Brill v. Friends World College*, 133 A.D. 2d 729 (2d Dep't 1987) (summary judgment, denying a legal fee as a matter of law); *Winston v. Rogers & Wells*, 214 A.D. 2d 677 (2d Dep't 1995) (legal fee forfeited, without any evidentiary hearing, on the *mere appearance* of counsel's impropriety despite the Surrogate's finding that there were questions of fact as to whether counsel actually violated the Code of Professional Responsibility).

Similarly, under Fed. R. Civ. P. 56, "[s]ummary judgment is appropriate when there is no genuine issue of *material* fact and the moving party is entitled to judgment as a matter of law [cit. om.]" *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *see also Warner-Jenkinson Co., Inc. v. Hilton David Chemical Co.*, 520 U.S. 17, 1997 U.S. LEXIS 1476 *41 n.8 (1997) (summary relief by the court is appropriate when, on the particular facts of the case, there is no *material* fact issue to be resolved by the trier of facts); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

In the case at Bar, the Petitioner was willing to proceed in the trial court upon his multiple motions (P. App., C, pp. 22a-26a).[11] It was not until late February, 1996, after numerous

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11. Thus, the parties charted their procedural course to proceed strictly on papers and oral argument. *Mitchell v. N.Y. Hospital*, 61 N.Y. 2d 208, 214 (1984); followed, *Mill Rock Plaza Assoc. v. Lively*, 224 A.D. 2d 301 (1st Dep't 1966).

motions had been argued and submitted for disposition, that Petitioner first attempted to raise factual questions (P. App., F, p. 34a-38a, at 34a), albeit on totally irrelevant or non-existent issues (*see* R. 1505-1513; R. App. E). Further, when Petitioner belatedly moved for an evidentiary hearing, he did so solely upon *state* civil procedural grounds, CPLR § 2218 (R. 1366-1367), not pursuant to a request for a criminal trial nor claim of federal — or even state — due process. Therefore, Petitioner may not raise due process claims in this Court.

In any event, an evidentiary hearing on Petitioner's irrelevant issues regarding Mrs. Yannitelli would not have altered the finding, based upon the undisputed documentary evidence, that Petitioner violated the Code of Professional Responsibility. Therefore, Petitioner was not legally prejudiced nor denied due process simply because there was no evidentiary hearing in respect of Mrs. Yannitelli's irrelevant alleged acts. *See United States v. Jennings*, 724 F.2d 436, 450-451, *reh. den.*, 726 F.2d 168 (5th Cir. 1984).

Petitioner now asserts, for the first time in *any* court, that due process requires that he should have been given an opportunity to "purge" his unethical behavior. But, the Record establishes that this argument, too, was not raised, pressed or ruled upon in the state courts. It may not be raised here.

Moreover, Petitioner ignores the fact that in his numerous repetitive motions in the trial court he repeatedly had such opportunity. But, instead of trying to rectify his wrongs, from the outset when he wrongfully took sole possession of the 1995 settlement proceeds and improperly transferred the money to a non-escrow account in a non-bank entity in the name of his "P.C." and then sought to hold the Yannitellis' money, EPTL § 5-4.6, or a portion thereof, hostage to his unrelated disputed claim on the putative "notes", continuing through his numerous

lawsuits against Mrs. Yannitelli while still her attorney of record in the underlying wrongful death action, *see* nn. 5, 6 and 10, *supra*, Petitioner repeatedly committed multiple violations of the Code of Professional Responsibility.

III.

THERE WAS NO EIGHTH AMENDMENT VIOLATION OF PETITIONER'S RIGHTS.

Petitioner argues that the failure of the trial court to award him an additional fee is an excessive forfeiture in violation of the Eighth Amendment to the U.S. Constitution. Petitioner did not previously raise this argument. It may not be raised here.

In addition, this new claim has no merit. The Eighth Amendment generally applies to fines and penalties, in whole or in part, payable to the government and not to civil forfeitures of property: here, clients' funds to be paid over to the clients. To the contrary, the Eighth Amendment basically constitutes a limit on the government's power "to extract payments" to the sovereign "as punishment for some offense" in violation of the criminal law. *Austin v. United States*, 509 U.S. 602, 609-610 (1993); *see also United States v. Bajakajian*, __ U.S. __, 118 S. Ct. 2028, 2037-2038 (1998); and *Browning-Ferris Industries of Vermont Inc. v. Kelco Disposal Inc.*, 492 U.S. 257, 262-263 (1989). Further, the Eighth Amendment does not apply to a "harm v. penalty" analysis in a civil forfeiture proceeding, *United States v. Ursery*, 518 U.S. 267, 284 (1996), contrary to the belated assertions of Petitioner.

In this proceeding, Petitioner's writings and undisputed acts conclusively established his repeatedly purposeful violations of the New York Code of Professional Responsibility, its statutes and court rules. Thus, here, there was repeated active

misconduct by Petitioner. Further, the size of the claimed one-third fee declared forfeited (approximately $560,000.00 in October, 1996 when the trial court declared Petitioner's entitlement to any fee forfeited, which with interest was approximately $717,000.00 when Dean Witter made payment in July, 1998) was less than twice the amount of the legal fees to date which Petitioner imposed upon the Yannitellis by reason of his abusive litigation tactics. Furthermore, this was neither the first — nor even the last — case in which Petitioner's actions as an attorney (and, even as a party) have run afoul of court rules and procedure. In short, Petitioner is the quintessential recidivist.[12]

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12. The egregiousness of Petitioner's documented unethical conduct and improper actions in this proceeding is underscored by other cases where he has been sanctioned. *See Yannitelli and Heller v. Navieras de Puerto Rico, et al.*, 1985 WL 440, at p. 3 of LEXIS print (S.D.N.Y. 3/21/85), *and* 106 F.R.D. 42, 44-45 (S.D.N.Y. 4/29/85); *Mate Picnic v. Seatrain Lines, Inc.*, 189 A.D. 2d 622, 623 (1st Dep't), *lv. app. den.*, 81 N.Y. 2d 709 (1993) (on appeal, the Appellate Division imposed a $5,000 sanction upon Petitioner, warning Petitioner that his failure to promptly pay would be referred to the Disciplinary Committee); *Stockler & Co. v. Heller*, 189 A.D. 2d 601, 603 (1st Dep't 1993) (affirming award of costs and attorney's fees, due to Petitioner's "totally frivolous" assertions, submitted "just really to delay"); *Heller v. Winter*, __ A.D. 2d __, NYLJ, 5/05/97, p. 27, col. 3 (1st Dep't 1997); and, most recently, *Kenneth Heller v. Louis Provenzano, Inc.*, __ A.D. 2d __, NYLJ, 1/11/99, p. 26, col. 1 (1st Dep't 1999) (remanding for a new trial, but unanimously affirming the imposition upon Petitioner, personally, of the then maximum New York State sanction of $10,000 as "a relatively mild one").

IV.

THE FAILURE OF THE TRIAL COURT JUSTICE TO RECUSE HERSELF DID NOT VIOLATE PETITIONER'S RIGHTS OF FEDERAL DUE PROCESS.

On the recusal issue, Petitioner once again urges upon this Court a matter not raised below.

In March, 1996, after months of motion practice and oral arguments thereon, and only after the Interim Order and the trial court's appropriate disclosure of the telephone calls placed to the trial court justice's district election manager, Petitioner for the first time objected to the trial court justice deciding the fee dispute. He did not do so on the basis of federal due process, however, but only on claims of common law and state statute. Therefore, questions of recusal under federal due process are foreclosed to Petitioner in this Court.

In any event, most questions of recusal are matters answered by common law, state statute or professional standards of the bench and bar. *Bracy v. Gramley*, 520 U.S. 899 (1997). The only federal issue in such cases is whether a judge has actual bias against the party complaining or an interest in the outcome of the particular case. *Bracy*, *supra*. Petitioner failed to show either.

Under New York Judiciary Law § 14, recusal is required only where a judge has a direct interest in the outcome of the case at bar, or there is either consanguinity or affinity between judge and parties, none of which is present here — not even in the argument made by Petitioner. Thus, the New York rule is consistent with and not in conflict with the federal rule. *Bracy*, *supra*.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

DAVID M. RABINOWITZ
Counsel of Record
MOSES & SINGER LLP
Attorneys for Respondents Jeannette Yannitelli (and her four non-party distributee-beneficiary sons)
1301 Avenue of the Americas
New York, New York 10019
(212) 554-7800

Of Counsel:

JOEL DAVID SHARROW
ARTHUR F. ABELMAN

APPENDIX

APPENDIX A — KENNETH HELLER'S LETTER TO JEANETTE YANNITELLI DATED JUNE 30, 1995 SEEKING PAYMENT OF PROMISSORY NOTES

KENNETH HELLER
COUNSELOR AT LAW
PROCTOR IN ADMIRALTY
291 BROADWAY - SUITE 1407
NEW YORK, NEW YORK 10007

(212) 982-6085
(212) 941-7485 (FAX)

June 30, 1995

Mrs. Jeannette Yannitelli
Mr. Donato Yannitelli,
Anthony Yannitelli,
and Vincent Yannitelli
55 Chestnut Street
Cold Springs, N.Y. 10516

Re: Yannitelli v. D. Yannitelli & Sons Construction Corp.
Supreme Court, New York County, Index No. 4888/80

Dear Yannitelli Family:

Please be advised that we hold outstanding promissory notes totalling $121,865.17.

We have persistently requested that they be paid by Mrs. Yannitelli.

The mose recent is a remaining sum of $5,000.00 from $10,000.00, of which only $5,000 was repaid, leaving the balance as above.

Appendix A

The balance of $126,865.17 must be fully repaid prior to the distribution of any funds which are under my control.

Very truly yours,

Kenneth Heller

KH/

APPENDIX B — KENNETH HELLER'S TELEFAX COMMUNICATIONS TO MOSES & SINGER LLP DATED AUGUST 23, 25 AND 28, 1995

FAX COVER SHEET

DATE: 8/23/95

TO

FAX: 554-7700 CLIENT: YANNITELLI

. . . .

NAME: PHILLIPPE ZIMMERMAN, ESQ.
FIRM: MOSES & SINGER
CITY: NYC STATE: NY . . . .

FROM

KENNETH HELLER, P.C.
291 Broadway, Ste. 1407
New York, NY 10007
TEL#: (212) 962-6085
FAX#: (212) 941-7485

NO. OF PAGES *INCLUDING* COVER PAGE: ONE

TITLE AND BRIEF DESCRIPTION OF ENCLOSURE OR MESSAGE:

I RECEIVED A COMPLAINT FROM THE DISCIPLINARY COMMITTEE TODAY FILED BY MRS. YANNITELLI. BECAUSE OF THE COMPLAINT, I REVOKE MY CONSENT TO ADJOURNMENT OF THE MOTION TO APPROVE DISTRIBUTION OF THE SETTLEMENT, RETURNABLE SEPTEMBER 1, 1995. IT IS NOW URGENT

Appendix B

THAT THIS MATTER BE RESOLVED IMMEDIATELY, CONTEMPT REMITTANCE OF ALL FUNDS TO DEFENDANTS' COUNSEL PENDING DECISION.

KENNETH HELLER

* * *

FAX COVER SHEET

DATE: 8/25/95

TO

FAX: 554-7700 CLIENT: YANNITELLI

. . . .

NAME: ARTHUR F. ABELMAN, ESQ.
FIRM: MOSES & SINGER
CITY: NYC STATE: NY . . . .

FROM

KENNETH HELLER, P.C.
291 Broadway, Ste. 1407
New York, NY 10007
TEL#: (212) 962-6085
FAX#: (212) 941-7485

NO. OF PAGES *INCLUDING* COVER PAGE: ONE

TITLE AND BRIEF DESCRIPTION OF ENCLOSURE OR MESSAGE:

Appendix B

IN RESPONSE TO YOUR 8/25/95 FAX WITH STIPULATION, I CANNOT AGREE TO ADJOURN IN VIEW OF MRS. YANNITELLI'S COMPLAINT TO THE GRIEVANCE COMMITTEE THAT I AM WITHHOLDING "HER MONEY." FURTHER, I AM UNDER A CONSTRAINT BY DENNIS DOODY, USAIG, TO OBTAIN AN ORDER TO DISBURSE MONIES, TO MAKE HIM MORE COMFORTABLE IN VIEW OF THE COMPLAINT AGAINST ME. THEREFORE, IF ANYONE ELSE IS TO HOLD THE MONIES, I WOULD PREFER IT TO BE MR. DOODY, OR MR. LOUIS MARTINEZ, ESQ., HIS ATTORNEY.

KENNETH HELLER

* * *

FAX COVER SHEET

DATE: 8/28/95

TO

FAX: 554-7700 CLIENT: YANNITELLI

. . . .

NAME: ARTHUR ABELMAN, ESQ.
FIRM: MOSES & SINGER

* * *

Appendix B

FROM

KENNETH HELLER, P.C.
291 Broadway, Ste. 1407
New York, NY 10007
TEL#: (212) 962-6085
FAX#: (212) 941-7485

NO. OF PAGES *INCLUDING* COVER PAGE: ONE

TITLE AND BRIEF DESCRIPTION OF ENCLOSURE OR MESSAGE:

RE: YOUR 8/28/95 FAX LETTER

I SAID IN VIEW OF THE COMPLAINT I AM COMPELLED TO RETURN THE FUNDS SO I CAN PROTECT MYSELF

s/ Kenneth

* * *

APPENDIX C — KENNETH HELLER'S LETTER TO MOSES & SINGER, LLP, DATED AUGUST 10, 1995

KENNETH HELLER
COUNSEL AT LAW
PROCTOR IN ADMIRALTY
291 BROADWAY - SUITE 1407
NEW YORK, NEW YORK 10007
(212) 962-6085
(212) 941-7485

August 10, 1995

BY FAX AND BY REGULAR MAIL

Moses & Singer, LLP
1301 Avenue of the Americas
New York, NY 10019-6076

Attn: *Joel David Sharrow, Esq.*

Re: *The Yannitelli Family*

Dear Sir:

This is a death case and, notwithstanding your demands, I cannot pay any monies without a court order; under EPTL §5-4.4, only the court can approve fees, disbursements and amounts. A copy of the May 5, 1992 order of Justice Greenfield approving distribution of settlement proceeds from the Mid-Hudson and Dennis settlement is enclosed for your reference.

I am trouble by your apparent personal attack upon me and my veracity.

Appendix C

I still do not have anything from my clients, in writing, instructing me or allowing me to talk to you.

The threatening climate seems to require me to protect myself and, for this reason, I am assuming that the Yannitelli family wants a change of attorneys.

I am, therefore, instructing my associate to proceed to ask the court to relieve me from my representation of the family.

I will then, in order to protect myself, consider remitting the funds back to Mr. Louis Martinez, attorney for the carrier.

APPENDIX D — PORTION OF KENNETH HELLER'S AFFIDAVIT DATED SEPTEMBER 22, 1995

* * *

6. Attorney Heller is, Alternatively, Entitled to Attorney's Fees Based on Quantum Meruit, If Yannitelli Revokes the Contingency Retainer Agreement.

Should this Court determine that the attorney-client contingency retainer agreement is no longer in force, Attorney Heller is entitled to payment for legal services and his disbursements pursuant to quantum meruit.

During the April 21, 1992 hearing (Exhibit 1), at p. 20, ll. 7-11, Attorney Heller advised the Court the hours spent on this case were enormous. (See, also, p. 35, ll. 3-8).

The Court recognized that most of the hours were expended on the claim against defendant D. Yannitelli & Sons Construction Corp., including the trial itself, which ended in a mistrial. (Exhibit 1, p. 22, ll. 9-17).

Attorney Heller previously advised the Court and his client that the time expended on the case, as of March 17, 1992, exceeded 4,000 hours over a period of 13 years. (Exhibit 7)

At the rate of $350.00 per hour, Attorney Heller is entitled to $1,400,000.00.

Attorney Heller estimates he has spent an additional 1,000 hours over the next three years, for an additional sum of $350,000.00.

Attorney Heller demands that the Court order the Yannitellis to pay Attorney Heller the sum of $1,750,000 to compensate him for his time on a quantum meruit basis.

7. Law of the Case, Res Judicata and Estoppel Against Inconsistent Position Preclude Transfer of This Case to Any Other Court.

The December 31, 1980 order of Justice Oliver Sutton, filed January 7, 1981 (Exhibit 8) denied defendants' motion to change the venue of this case from New York County to Putnam County.

The case was commenced in New York County, tried in New York County, and settled as to all parties in New York County.

Law of the case bars any attempt to belatedly transfer this action to Putnam County, or to any other court, to resolve the remaining ministerial action of directing a compromise and settlement, distribution and payment of attorney's fees and disbursements.

8. Plaintiff Yannitelli Must Post A Bond For $1,700,000 As a Quid Pro Quo Should This Court Direct A Turnover of the Settlement Fund to Yannitelli or Her Incoming Attorneys.

Attorney Heller has an attorney's lien on the settlement fund in his possession to secure payment of his attorney's fees and disbursements.

Appendix D

Attorney Heller is entitled to his disbursements of $30,375.06

Attorney Heller is entitled to his one-third contingency fee on the net amount of the settlement, for a total of $556,541.67.

Alternatively, Heller is entitled to the entire sum of $1,700,000 for his attorney's fee based on quantum meruit.

APPENDIX E — PORTIONS OF AFFIDAVIT OF DAVID PICKER, ESQ., DATED FEBRUARY 28, 1996

* * *

ARGUMENT

I. HELLER'S MOTION MUST BE DENIED

A. *Heller Is Not Entitled to a Jury Trial In This EPTL § 5-4.6 Wrongful Death Distribution Proceeding*

There are No Material Factual Disputes To Be Determined

10. According to attorney Heller (Heller Aff. p.7 [bottom]), his motion "is primarily a motion to determine issues of fact." The law recognizes no such creature.[2]

11. More important, there must be a genuine issue as to a fact material to the motion. But that is utterly *lacking* here.[3] It is for the Court, as a matter of law, to determine the genuiness and the materiality of an alleged factual dispute. As shown below, attorney Heller's latest motion is just a bald attempt to make an end run around constitutional due process and the CPLR, as to issues that are not the subject of these proceedings.

---

2. Nor is attorney Heller entitled to make a motion under CPLR § 2218. CPLR § 2218 merely allows ("The court *may* order . . ."), but does not require, the Court to refer an issue of fact raised on a motion to be separately tried.

3. This distinguishes the cases cited by attorney Heller, which are therefore inapplicable.

Appendix E

12. Thus, attorney Heller has burdened the Court with a list (Heller Aff. pp. 11-13) of some 18 alleged factual issues which he claims the Court must decide before it can decide the legal issues. Heller is wrong, as a review of these issues establishes:

> "1. Did Mrs. Yannitelli retain Mr. Heller and sign a retainer on June 21, 1978?
>
> 2. Was this retainer intended to include the action against D. Yannitelli & Sons?"

13. This is not disputed. It is also not disputed that Heller and Mrs. Yannitelli sign the retainer (Heller. Aff. Exh. 7) in a capacity (Administratrix of the deceased estate) that she never held.

14. Nor is there any issue of "fact": construction of the written retainer agreement is for the *Court* (*e.g.*, *West, Weir & Bartel, Inc. v. Carter Paint Co.*, 25 N.Y.2d 535, 540 (1969)), giving due regard to the law that retainer agreements are to be strictly construed against the attorney (*e.g.*, *Shaw v. Manufacturers Hanover Tr. Co.*, 68 N.Y.2d 172, 174, 177 (1986)).

15. More important, all issues as to the retainer agreement are *immaterial*, because as we have established, as a matter of law, retainer agreements are not binding on this Court in this E.P.T.L. § 5-4.6 distribution proceeding. *E.g.*, *Nicastro v. Park*, 186 A.D.2d 805 (2d Dep't 1992). Attorney Heller himself recognized this at argument before Justice Greenfield (Heller Aff. Exh. 8, pp. 14-15).

16. The retainer agreement is further immaterial because of attorney Heller's subsequent documented misconduct.

> "3. Did Mrs. Yannitelli affirm the validity of the retainer agreement before Justice Greenfield?"

17. Again, this is immaterial for the reasons just stated. Moreover, there is no dispute as to what Mrs. Yannitelli said to Justice Greenfield on the record in defense against attorney Heller's attempt to grab even more money than he'd agreed to in his retainer agreement.

> "4. Did Kenneth Heller request Quantum Meruit from Justice Greenfield?"

18. This is not disputed. Its only relevance is to show that attorney Heller has acknowledged and knows that the amount of his fee, if any, is committed to the discretion of the Court.

> "5. Did Justice Greenfield deny Quantum Meruit . . . to . . . Heller and . . . does Kenneth Heller have a right to demand Quantum Meruit here?"

19. This is also not disputed. It is also not dispute that Justice Greenfield declared that the Court may grant quantum meruit to depart downward, but *never upward*, from the retainer's agreement (*see* Heller Aff. Exh. 8, pp. 19-20). And attorney Heller's "right" to "demand" quantum meruit does *not* mean he is entitled to it!

> "6. Did Mrs. Yannitelli over the years from 1978 on, execute a series of promissory notes for which she received the money.

7. Did Mrs. Yannitelli execute a note in 1995 for $10,000 and repay only $5,000 of same."

20. This dispute is immaterial. Heller has not sued on the alleged notes, and they and any debt they may represent are not before the Court. Yet he is here suddenly seeking a *jury trial* on this immaterial and *not*-sued-upon issue. Constitutional due process and the C.P.L.R. prohibit this absurd attempt.

21. Furthermore, as a matter of law, attorney Heller may not off-set or lien against the proceeds of this action any such debt he may claim (*see Kaplan v. Reuss*, 113 A.D.2d 184, 186 (2d Dep't 1984), *aff'd*, 68 N.Y.2d (1986); *Adan v. Abbot*, 114 Misc.2d 735, 736-37 (Sup. Ct. N.Y. Co. 1982)). His attempts to do so here constitute misconduct.

"8. Did Mrs. Yannitelli pilfer the notes from Kenneth Heller's office on March 13, 1990?

9. Did Mrs. Yannitelli steal $22, 850 from Mrs. & Mrs. Pires' home in Seminole, Florida on April 13, 1991?"

22. These absurd and libelous fabrications are not relevant to *Heller's* conduct and whether or not he is entitled to a fee in this case, the only issue genuinely before the Court. These fabrications have no legitimate purpose in this case.

"10. Did Kenneth Heller request of Justice Greenfield that he be relieved in representation of Mrs. Yannitelli in 1990?

11. In May, 1992 was Kenneth Heller granted permission by Justice Greenfield to be conditionally relieved at the conclusion of the entire case?"

23. There is no record or evidence of any of this. Attorney Heller's attempt to create a so-called "fact issue" by his self-serving statement as to what was supposedly done off the record is almost laughably outrageous. Not surprisingly, attorney Heller never before alleged this, neither when he first moved to withdraw in August 1995, nor when he again moved to withdraw on February 1, 1996. In any event, neither Mrs. Yannitelli nor the Court is bound by what Justice Greenfield may or may not have said *off* the record in an informal conference.

> "12. Did Kenneth Heller bring on a motion in May, 1992 to be relieved as counsel?"

24. This is not disputed. It is also not disputed that attorney Heller *withdrew* that motion. It is also not disputed that his said motion to withdraw (*see* accompanying J. Yannitelli Aff., Exh. 6) was *not* based on any of the alleged "criminal misconduct" he now belatedly accuses his client of.

> "13. Did Mrs. Yannitelli execute a series of notes in 1991 to replace the stolen notes?"

25. The notes which attorney Heller induced his client to sign under false pretenses were not "to replace" any other notes. Moreover, as previously explained, the alleged notes and debts (if any) of Mrs. Yannitelli are not the subject of or relevant to this lawsuit.

> "14. Was motion to be relieved withdrawn in 1992 upon Mrs. Yannitelli depositing in escrow a sum of money that she received to guaranty payment by her of promissory notes?"

26. The motion was withdrawn. Mrs. Yannitelli's share of proceeds were deposited in escrow — and then ultimately all paid to her. None of this is relevant.

> "15. Did Mrs. Yannitelli in 1994 while Mr. Heller was still her attorney seek out adversaries who she knew were in litigation with Mr. Heller and deliver false and defamatory statements accusing Mr. Heller and a Justice of the Supreme Court of wrong doing?"

27. What Mrs. Yannitelli said is on the record and undisputed (*see* her Feb. 10, 1996 Aff. ¶¶ 23-29). It is also not relevant.

28. Furthermore, there were no false statements and no wrong-doing was alleged. To the contrary, Justice Wright apparently *agreed* that it would be inappropriate for him to continue on that case, and he recused himself (*see* accompanying J. Yannitelli Aff. Exh. 8). And attorney Heller *continued* to represent Mrs. Yannitelli thereafter. Again, this allegation has nothing to do with this proceeding.

> "16. Did Mrs. Yannitelli sign a letter confessing to the fact that she brought false information and was suffering from jealous, menopausal, sometimes intoxicated rage?"

29. Attorney Heller induced her to sign this letter, or he would not re-try her case. Again this letter has nothing to do with the issues before the Court.

> "17. Is Mrs. Yannitelli a jealous, vengeful person?"

30. Of course not. And we gladly invite comparison by the Court between Mrs. Yannitelli's conduct in this litigation and attorney Heller's. Nor is this highly personal attack in any way material to this proceeding. Finally:

> "18. Did Kenneth Heller recover $1,700,000 for Mrs. Yannitelli and her family and did they accept his amount?"

31. As even attorney Heller admits, this is not disputed.

The One Fact Issue that Is Material Is Undisputed

32. What is most significant is the critical issue that attorney Heller does *not* claim is disputed: he does not deny that he threatened to delay seeking a distribution of these proceeds — to be distributed to *all* the Yannitellis — unless and until Mrs. Yannitelli paid him the *unrelated* debt that he alleges she (and she alone) owes him. One June 30, 1995, he wrote to the Yannitellis:

> "Please be advised that we hold outstanding promissory notes totalling $121,865.17.
>
> We have persistently requested that they be paid by Mrs. Yannitelli.
>
> . . .
>
> The balance of $126,865.17 *must be fully repaid* ***prior*** to the distribution of any funds which *are under my control.*" [Emphasis added].

A copy of this letter was attached to attorney Heller's October 11, 1995 Affidavit. An additional copy is Exhibit A hereto.

33. This disloyalty and misconduct is what forced the Yannitellis to hire Moses & Singer LLP.

34. Thereafter, under pressure from this firm and the Yannitellis, attorney Heller *three* times, in *writing*, threatened to return the settlement proceeds to the defendant's insurer. Copies of his said telefaxes were previously submitted as Exhibits P, R and T to Mrs. Yannitelli's Sept. 12, 1995 Affidavit; additional copies are Exhibit B hereto.

35. Yet, attorney Heller does *not* allege that this creates any factual disputes requiring a hearing. He is *right*: his behavior is *fully documented* and *undisputed*; it raises only *legal* issues for the Court's determination.

36. Attorney Heller's undisputed actions constitute attorney misconduct, a breach of his strict fiduciary duty of loyalty to his client, and breach of his contract of retention as her attorney. Indeed, Judiciary Law § 487(2) makes it a *crime* (misdemeanor) for an attorney to "wilfully delay[ ] his client's suit with a view to his own gain." That is precisely what Heller did here.[4]

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4. In addition, DR 5-103(B) prohibits an attorney from lending money or giving other financial assistance to a client while litigation is pending. DR 5-104(A) prohibits an attorney from engaging in business transactions with a client in most situations. The reasons for these strictures are made painfully obvious by this case.

Appendix E

There Is No Right to a Jury In This EPTL § 5-4.6 Proceeding, which Is Committed to the Discretion of the Court

37. This is not a pleanary action; it is not an action at common law. This is, rather, a statutory summary proceeding, pursuant to E.P.T.L. § 5-4.6, to distribute the proceeds of this wrongful death action and set attorney Heller's fee (if any). Ample case law makes clear that it is for the *Court*, in its discretion, to set that fee. *E.g.*, *Nicastro v. Park*, *supra*. Heller himself correctly argued to Justice Greenfield that the matter of his fee was committed to the Court's discretion (*see* Heller Aff. Exh. 8, pp. 14-15). Thus, there is no right to a jury, even if there were factual issues to be determined (which there are not).

B. *Heller Was Not Previously Discharged By His Client, And If He Had Been, It Would Have Been Because of His Own Misconduct*

38. Attorney Heller seeks to vacate this Court's denial of his previous motion to withdraw on the remarkable, but spurious, grounds that said

> "motion was erroneously brought, because I [Heller] had been earlier discharged . . ., or alternatively, no motion was required, because 'Just Cause' exists and existed pursuant to DR 2-110 . . ."

Heller Aff. p.2. Attorney Heller is wrong on every point.

39. First, he was not discharged, and *could not* have been discharged without a Court order or a formal substitution. DR 2-110(A)(1) makes this clear:

* * *